IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC92175
	)	
EMILY BOLDEN,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 7
THE HONORABLE JOHN J. RILEY, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Emily Bolden, was convicted on February 4, 2010 of the class A felony of assault in the first degree, a violation of Section 565.050 (Count III) and the unclassified felony of armed criminal action, a violation of Section 571.015 (Count IV). On April 9, 2010, the court sentenced Emily to terms of ten years in prison on Count III and three years on Count IV, to be served concurrently, in the Missouri Department of Corrections. The Court of Appeals, Eastern District, issued an opinion affirming the conviction. Mo. Const. Art. V, Sec. 3; Section 477.050. This Court ordered transfer on January 31, 2012 after Ms. Bolden's application. Mo. Const. Art. V, Sec. 9; Rule 83.04.

STATEMENT OF FACTS

Fannie Powell lived in an apartment in the 2600 block of Oregon Street in the City of St. Louis with her husband, two adult daughters Tiffany and Danielle, and three grandchildren. Tr. 291-292, 326. Katina Harris lived down the street. Tr. 293. Katina was a friend of Danielle. Tr. 292, 295, 396, 495. Katina lived with Randy Bolden and their two children. Tr. 327, 402, 495, 501.

On April 21, 2007, there was a party at Katina and Randy's house. Tr. 296. Fannie Powell arrived and met Randy for the first time. Tr. 337. Fannie and Randy disagreed about the way Randy was disciplining his son. Tr. 299. Fannie told Katina she could send this son to Fannie's apartment to play with her granddaughter. Tr. 300, 505.

Later in the day, there was an argument between Randy, Katina, Danielle, and Randy's sister, Emily Bolden. Tr. 301. According to Danielle, Randy "had more attention for his sister [Emily] than he did for his baby's mom [Katina]." Tr. 503. Randy and Katina had an "unhealthy" relationship and were arguing. Tr. 502, 506. Katina told Randy to leave. Tr. 506. Emily became involved in the argument and took Randy's side. Tr. 507. Katina took Emily's keys and ran down the street. Tr. 507. Eventually, Emily retrieved her keys, and Randy and Emily left together, along with

Emily's children. Tr. 507, 509.[1] Katina left her older child in the care of Fannie and went to her sister's house. Tr. 303, 402.

About nine that evening, Emily and Randy appeared at the Fannie's house looking for Danielle and Katina. Tr. 304, 305, 338, 403-404, 409. Tiffany told them that Katina was not there, and ordered them to leave. Tr. 362, 408. According to Tiffany, Randy and Emily became loud and aggressive. Tr. 407-408. Randy was intoxicated. Tr. 793. Fannie heard the argument and came to the door. Tr. 304, 409. She claimed to see Emily lunge forward with a knife and stab Tiffany in the hand. Tr. 306, 409, 411-412.[2]

Then, according to Fannie, she and Emily began to fight. Tr. 307. Fannie was not sure who started the fight. Tr. 373. Fannie was cut eleven times on her head and several more times on her body. Tr. 308, 313, 322. She was fighting and could not feel the cuts as they were being inflicted. Tr. 308, 309. She said Randy was holding Tiffany down on the ground. Tr. 309. Eventually Randy pulled Emily towards the car and said, "it's time to go." Tr. 310. He also allegedly said, "Give that message to Danielle." Tr. 310.

Emily Bolden was charged with three counts of assault and armed criminal action for stabbing Tiffany Powell in the hand (Counts I and II), for cutting Fannie Powell

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[1] According to Danielle, Emily hit Katina on the head with a brick. Tr. 508. Katina denied that happened. Tr. 618. Emily was acquitted of that conduct (Counts V and VI). L.F. 5.

[2] Emily was also acquitted of this conduct (Counts I and II). L.F. 5.

(Counts III and IV), and for striking Katina Harris in the head (Counts V and VI). L.F. 12-17. The State charged that Randy acted in concert with Emily on Counts I through IV. *Id.*

A joint trial was held on February 1 through February 4, 2009. Tr. 1-5. As to Counts I through IV, Emily maintained her actions were justified because she acted in lawful defense of her brother. Tr. 913. Randy testified about problems that started early in the day. Tr. 733. He left home with Emily and returned that evening to find his front door locked and nobody home. Tr. 743. He and Emily backed her car down the street to look for Katina, and stopped in front of Fannie's apartment, because he had last seen Katina with Fannie's daughter Danielle. Tr. 743.

Randy testified that after he knocked on the front door, he heard voices, including a man's voice, ordering him off the porch. Tr. 753-754, 762-763. He shouted for the people inside to tell Katina that he was locked out of their house. Tr. 755. He then heard people coming down the stairs and turned to see Tiffany "with an object in her hand coming straight down." Tr. 755. Tiffany stabbed him in the eye. Tr. 755. He suffered a fracture of the bone around his eye and blindness. Tr. 757.

After being stabbed in the eye, Randy felt a sharp blow to his head. Tr. 759. He woke up in an ambulance. Tr. 759. His shoes and wallet were missing. Tr. 762. Emily testified that when she saw an unidentified man, Fannie, and Tiffany attack her brother, she grabbed a knife from her car and "started swinging." Tr. 820. She wanted them to

back away. Tr. 820. She was afraid both she and her brother were going to be hurt. Tr. 821.

Emily and Randy were found guilty of only the charges relating to Fannie Powell, Counts III (assault) and IV (armed criminal action). L.F. 6. Emily waived jury sentencing, and the trial court sentenced her to concurrent terms of imprisonment of ten years (Count III) and three years (Count IV). Tr. 972. This appeal followed. L.F. 87.

Emily will cite to the Record on Appeal as "L.F" (legal file), "Supp. L.F." (supplemental legal file), and "Tr." (transcript). All statutory authority is to RSMO 2000. Also, certain facts will be only stated in the argument section to minimize repetition.

POINTS RELIED ON

I - The trial court plainly erred in submitting Instruction 14 (Use of Force in Defense of Third Persons) to the jury, because the instruction was patterned on an incorrect MAI and contained material defects that misdirected the jury, failed to instruct the jury on the applicable law, relieved the State of its burden on a contested issue, and affected the verdict in violation of Emily Bolden's right to a fair trial and due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the instruction: (1) was incorrectly patterned on MAI-CR 3d 306.08A, which applies to offenses committed after August 28, 2007; (2) omitted explanatory language about imminent danger from those acting with the victim; (3) incorrectly used a masculine pronoun instead of a feminine pronoun, significantly changing the meaning of a sentence; (4) incorrectly instructed the jury to consider the imminent use of unlawful force by only Fannie Powell, rather than force by Fannie Powell and "those whom the defendant reasonably believed were acting together with Fannie Powell," which included two other aggressors.

State v. Beck, 167 S.W.3d 767 (Mo. App. W.D. 2005)

State v. Westfall, 75 S.W.3d 278 (Mo. banc 2002)

State v. Reed, 243 S.W.3d 538 (Mo. App. E.D. 2008)

Section 563.031

MAI-CR 3d 306.08

MAI-CR 3d 306.06

U.S. Const., Amends. V, VI, and XIV

Mo. Const., Art. I, Secs. 10 and 18(a)

II - The trial court abused its discretion in refusing to hold an evidentiary hearing to determine whether the verdicts should be set aside, and in overruling the motion for new trial, because the court had credible information suggesting that juror Shawn Richardson was not qualified to serve and had engaged in misconduct, depriving Ms. Bolden of her right to a fair and impartial jury, a unanimous verdict, and to due process of law in violation of the Fifth, Sixth, and Fourteenth Amendments to United States Constitution, and the Missouri Constitution, Article I, Sections 10, 18(a) and 22(a), in that the court was on notice that this juror had stated to counsel after trial (1) that the verdicts he rendered were not his and that he falsely stated it was his verdict when the jury was polled, and (2) that he was not qualified to serve on the jury.

Fleshner v. Pepose Vision Institute, P.C., 304 S.W.3d 81 (Mo. banc 2010)

White v. State, 290 S.W.3d 162 (Mo. App. E.D. 2009)

State v. Babb, 680 S.W.2d 150 (Mo. banc 1984)

Section 547.020

U.S. Const., Amends. V, VI, and XIV

Mo. Const., Art. I, secs. 10, 18(a), and 22(a)

ARGUMENT

I - The trial court plainly erred in submitting Instruction 14 (Use of Force in Defense of Third Persons) to the jury, because the instruction was patterned on an incorrect MAI and contained material defects that misdirected the jury, failed to instruct the jury on the applicable law, relieved the State of its burden on a contested issue, and affected the verdict in violation of Emily Bolden's right to a fair trial and due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the instruction: (1) was incorrectly patterned on MAI-CR 3d 306.08A, which applies to offenses committed after August 28, 2007; (2) omitted explanatory language about imminent danger from those acting with the victim; (3) incorrectly used a masculine pronoun instead of a feminine pronoun, significantly changing the meaning of a sentence; (4) incorrectly instructed the jury to consider the imminent use of unlawful force by only Fannie Powell, rather than force by Fannie Powell and "those whom the defendant reasonably believed were acting together with Fannie Powell," which included two other aggressors.

Preservation

Because trial counsel failed to object to the instruction, the error is subject to plain error review. Tr. 868-869; Rule 30.20.

Standard of Review

"Where the defense did not object to an instruction, [courts] review only for plain error." *State v. Reed*, 243 S.W.3d 538, 540 (Mo. App. E.D. 2008). Plain error relief is appropriate when "the trial court's error violated the appellant's substantial rights resulting in manifest injustice or a miscarriage of justice." *Id.* (*citing* Rule 30.20 and *State v. Sidebottom*, 753 S.W.2d 915, 920 (Mo. banc 1988)).

Failure to use an applicable Missouri Approved Instruction (MAI) is presumed prejudicial. *Reed*, 243 S.W.3d at 540. However, under plain error review, a party has to show more than prejudice:

> For instructional error to rise to the level of plain error, the trial court must have so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict. In determining whether the misdirection likely affected the jury's verdict, an appellate court will be more inclined to reverse in cases where the erroneous instruction did not merely allow a wrong word or some other ambiguity to exist, but excused the State from its burden of proof on a contested element of the crime.

Id. However, "[e]ven if no objection is made, the failure to instruct upon a defense supported by the evidence is plain error affecting substantial rights." *State v. Westfall*, 75 S.W.3d 278, 281 (Mo. banc 2002).

Discussion of Error

A verdict-directing instruction must contain "each element of the offense charged" and must "require the jury to find every fact necessary to constitute the essential elements of the offense charged." *State v. Krause*, 682 S.W.2d 55, 56 (Mo. App. E.D. 1985). "To ascertain whether or not the omission of language from an instruction is error, the evidence is viewed in the light most favorable to the defendant and the theory propounded by the defendant." *Westfall*, 75 S.W.3d at 280. Once a defendant injects self-defense into the case, "the trial court [is] required to instruct on self-defense, even in the absence of a request for such an instruction, and even if such an instruction was offered but not in proper form." *Westfall*, 75 S.W.3d at 281 n. 9.

There were numerous errors in Instruction 14, concerning the use of force by Emily against Fannie Powell in Count III, the charge of assault in the first degree. L.F. 38-40. This, along with a related armed criminal action count, was the only charge upon which Emily was convicted. L.F. 6, 15-17.

For ease of comparison, Appellant has set out the text of the correct instruction and Instruction 14 below, with substantive differences in boldface type.[3] Also, the

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[3] The parties have stipulated that the copies of the jury instructions given to the jury were not located in the circuit court file by either party. The court apparently made certain corrections to the instructions that are not reflected in the copies in the Legal File, which included changing the word "Tiffany Powell" to "Fannie Powell" in one instance

comparable sections of the correct instruction and Instruction 14 are numbered in brackets for ease of reference in the remainder of this point:

Correct Instruction	**Instruction 14**
[1] One of the issues as to Count III is whether the use of force by the defendant against Fannie Powell **was in defense of another person.** In this state, the use of force (including the use of deadly force) to protect another person from harm is lawful in certain situations.	**[1]** One of the issues as to Count III is whether the use of force by the defendant against Fannie Powell **was lawful**. In this state, the use of force, including the use of deadly force, to protect another person is lawful in certain situations.
[2] A person can lawfully use force to protect another person against an attack unless, under the circumstances as she reasonably believes them to be, the person she seeks to protect would not be justified in using such force to protect himself. A person who is the initial aggressor, that is, one who first attacks	**[2]** A person can lawfully use force to protect another person against an attack unless, under the circumstances as she reasonably believes them to be, the person she seeks to protect would not be justified in using such force to protect himself. A person who is an initial aggressor, that is, one who first attacks

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(L.F. 39) and changing "Count I" to "Count III" on the final page of the instruction (L.F. 40). Tr. 881.

or threatens to attack another is not justified in using force to protect himself from the counter-attack that he provoked. If, under the circumstances as a person reasonably believed them to be, the person she seeks to protect was the initial aggressor then she is not entitled to use force to protect the other person.	or threatens to attack another is not justified in using force to protect himself from the counter-attack that he provoked. If, under the circumstances as a person reasonably believed them to be, the person she seeks to protect was the initial aggressor, then she is not entitled to use force to protect the other person.
[3] In order for a person lawfully to use force in defense of another person, such a defender must reasonably believe **the person she is trying to protect is in imminent danger of harm from a third person and from persons she reasonably believes are acting together with that person.** **The person she is trying to protect need not be in actual danger but the defender must have a reasonable belief that the person is in such danger.** **If the person trying to protect another person has such a belief, she is then permitted to use that amount of force which she reasonably believes to**	**[3]** In order for a person lawfully to use force in defense of another person, such a defender must reasonably believe **such force is necessary to defend the person she is trying to protect from what he [sic] reasonably believes to be the imminent use of unlawful force.**

be necessary to protect the other person.	
[4] But a person acting in the defense of another person is not permitted to use **deadly force, that is, force which she knows will create a substantial risk of causing death or serious physical injury, unless she reasonably believes the person she is trying to protect is in imminent danger of death or serious physical injury. And even then, a person may use deadly force only if she reasonably believes the use of such force is necessary to protect the other person.** As used in this instruction, "deadly force" means physical force which is use[d] with the purpose of causing or which a person knows to create a substantial risk of causing death or serious physical injury.	**[4]** But, a person acting in the defense of another person is not permitted to use **deadly force unless she reasonably believes the use of deadly force is necessary to protect the person against death or serious physical injury.** As used in this instruction, "deadly force" means physical force which is use [sic] with the purpose of causing or which a person knows to create a substantial risk of causing death or serious physical injury**.**

[5] As used in this instruction, the term "reasonable belief" means a belief based on reasonable grounds, that is, grounds that could lead a reasonable person in the same situation to the same belief. This depends upon how the facts reasonably appeared. It does not depend upon whether the belief turned out to be true or false.	**[5]** As used in this instruction, the term "reasonably believe" means a belief based on reasonable grounds, that is, grounds that could lead a reasonable person in the same situation to the same belief. This depends on how the facts reasonably appeared. It does not depend on whether the belief turned out to be true or false.
[6] On the issue of the defense of another person as to Count III, you are instructed as follows: If, under the circumstances as the defendant reasonably believed them to be, Randy Bolden was not the initial aggressor in the encounter with Fannie Powell, And **if** the defendant reasonably believed **Randy Bolden was in imminent danger of death or serious physical injury from the acts of Fannie Powell, and those whom the**	**[6]** On the issue of defense of another person as to Count III, you are instructed as follows: First, if, under the circumstances as the defendant reasonably believed them to be, Randy Bolden was not the initial aggressor in the encounter with Fannie Powell, Second, **in [sic]** the defendant reasonably believed **that the use of force was necessary to defend Randy Bolden from what the defendant reasonably believed to be the imminent use of unlawful force by**

defendant reasonably believed were acting in concert with Fannie Powell, and she reasonably believed that the use of deadly force was necessary to defend Randy Bolden, then she acted in lawful defense of another person.	**Fannie Powell**, and Third, the defendant reasonably believed that the use of deadly force was necessary to protect Randy Bolden **from death or serious physical injury from the acts of Fannie Powell, then her use of deadly force is justifiable** and she acted in lawful defense of another person.
[7] The state has the burden of proving beyond a reasonable doubt that the defendant did not act in lawful defense of another person. Unless you find beyond a reasonable doubt that the defendant did not act in lawful defense of another person, you must find the defendant not guilty under **Count III.**	**[7]** The state has the burden of proving beyond a reasonable doubt that the defendant did not act in lawful defense of another person. Unless you find beyond a reasonable doubt that the defendant did not act in lawful defense of another person, you must find the defendant not guilty under **Count III.**
Citations: MAI-CR 3d 306.08; MAI-CR 3d 306.06 (Use of Force in Self-Defense) Note on Use 7; *Beck*, 167 S.W.3d at 788.	**Citation:** L.F. 38-40.

Incorrect Model Instruction. First, Instruction 14 was incorrectly patterned on MAI-CR 3d 306.08A, which applies to offenses committed after August 28, 2007. L.F. 40; Tr. 868; MAI-CR 3d 306.08A. As the date of the alleged offense in this case was April 21, 2007, the correct model instruction was MAI-CR 3d 306.08. *See* MAI-CR 3d 306.08A (Note on Use 1); L.F. 15. This was "evident, obvious, and clear" error. *State v. Garvey*, 328 S.W.3d 408, 416 (Mo. App. E.D. 2010).

Multiple Assailants. The second problem is that the court failed to include language that is applicable when there is evidence that the defendant acted in response to multiple assailants, which should have been included in sections **[3]** and **[6]** of the instruction. MAI-CR 3d 306.06, Note on Use 7 (stating, "[if] there is evidence that the defendant acted in self-defense against an attack by multiple assailants, it may be necessary to modify this form").

In *State v. Beck*, 167 S.W.3d 767, 770 (Mo. App. W.D. 2005), there was evidence of a fight between the defendant, the victim, and two other men acting together with the victim. The defendant admitted to stabbing the victim, but claimed he did so in self-defense. *Id.* The defendant testified that the victim and his friends started a fight with him. *Id.* The victim held him, while the victim's friends brandished a baseball bat and metal pipe in a threatening manner. *Id.* Reviewing for plain error, the Western District found that the trial court misinstructed the jury when the instruction did not allow the jury to consider the actions of the victim's friends in determining whether the defendant acted in self-defense. 167 S.W.3d at 785.

In this case, there was similar evidence about multiple assailants that the jury did not consider. According to evidence at trial, Tiffany Powell, Fannie Powell, and a man yelled threats from inside the apartment. Tr. 749, 751, 753. Tiffany Powell stabbed Randy Bolden in the eye, blinding him. Tr. 755. Then, Randy testified that someone else cracked him over the head, rendering him unconscious. Tr. 759. He woke up in an ambulance. Tr. 759. Emily Bolden testified that Tiffany Powell, Fannie Powell, and a man were attacking her brother, necessitating the use of force against Fannie Powell. Tr. 820. Emily testified that when she saw the Powells attack her brother, she grabbed a knife she had in her car and "started swinging." Tr. 820. She wanted them to back up. Tr. 820. She was afraid both she and Randy would be hurt. Tr. 821. After Fannie was cut, Tiffany and the man backed up. Tr. 821.

While *Beck* and MAI-CR 3d 306.06 apply to self-defense, the law governing self-defense and defense of third persons is the same in all relevant respects. The model instructions are virtually the same, except for changes to language substituting defense of third persons for self-defense. MAI-CR 3d 306.06 (self-defense); MAI-CR 3d 306.08 (defense of third persons). Section 563.031.1 governs both, stating, "A person may, subject to the provision of subsection 2 of this section, use physical force upon another person when and to the extent he reasonably believes such force to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful force by such other person." The only difference between defense of a third person and self-defense is that "the force may not exceed that which the

defended person," rather than the defender herself, "would be justified in using." *State v. Pounders*, 913 S.W.2d 904, 907 (Mo. App. S.D. 1996).[4]

As in *Beck*, the jury was misinstructed, and as a result, the jury only considered the actions of Fannie Powell in determining whether Emily acted reasonably in defending Randy. In both cases, the defendant alleged a reasonable belief that force was necessary to defend against the acts of three assailants, not one. *Id.* at 787. The addition of two aggressive assailants – including Tiffany, who stabbed Randy in the eye, and a man who knocked him unconscious – would have been material to the jury's determination of whether Emily's acts were reasonable. L.F. 38. The error in this instruction is plain error. *Id.*

Pronoun Problem. Another problem with Instruction 14 appears in section **[3].** Instruction 14 read: "In order for a person lawfully to use force in defense of another person, such a defender must reasonably believe such force is necessary to defend the person she is trying to protect from what *he* reasonably believes to be the imminent use of unlawful force." L.F. 38 (emphasis added). The instruction incorrectly used the

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[4] The Notes on Use for MAI-CR 3d 306.08 (defense of third persons) does not contain a parallel note similar to Note on Use 7 in MAI-CR 3d 306.06 (self-defense), which states, "[if] there is evidence that the defendant acted in self-defense against an attack by multiple assailants, it may be necessary to modify this form." This is an error in MAI that should be corrected.

masculine pronoun "he" when referring to the female defendant, Emily Bolden, and her reasonable belief about the imminent use of unlawful force against Randy Bolden. L.F. 38. The instruction thus incorrectly reads that Emily Bolden must reasonably believe such force was necessary based upon what *Randy Bolden* reasonably believed. L.F. 38.

The Missouri Approved Instructions mandate that necessary modifications be made to pronouns in the instructions. MAI-CR 3d 304.02. Further, "the defended person's right to use force will be analyzed as if the facts were as reasonably believed by the defendant [that is] if *the defendant* reasonably believed that the defended third person was in imminent danger of death or serious bodily injury." 32 Mo. Prac., Missouri Criminal Law Sec 9.3 (2d Ed. 2010) (emphasis added) (*citing State v. Hughes*, 84 S.W.3d 176 (Mo. App. S.D. 2003)). This was "evident, obvious, and clear" error. *Garvey*, 328 S.W.3d at 416.

This error is significant under the facts of this case, because Randy Bolden testified that he was knocked unconscious after he was stabbed in the eye. Tr. 759. The charged incident occurred while Randy was knocked out. Tr. 759. Emily testified that she saw the three people attacking her brother. Tr. 820. Thus, the difference between what Randy and Emily would have each reasonably believed during that time period was significantly different. As written, the instruction was confusing and instructed the jury to consider what Randy may have reasonably believed, rather than what Emily may have reasonably believed.

Prejudice

This instruction's numerous errors prejudiced Emily and caused her to be convicted of Counts III and IV while being acquitted of all other charges.

Under the plain error standard, instructional error must have "so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict." *Reed*, 243 S.W.3d at 540. Courts are more likely to grant a new trial under this standard if the error in the instruction "excused the State from its burden of proof on a contested element of the crime" rather than the instruction containing merely a technical defect. *Id.; State v. Doolittle*, 896 S.W.2d 27, 30 (Mo. banc 1995).

The errors in this instruction misdirected the jury, relieved the State from its burden on a contested issue, and affected the verdict. *Reed*, 243 S.W.3d at 540. First, the use of an incorrect model instruction created a situation where the correct instruction and Instruction 14 were materially different. Specifically, Sections **[3]** and **[4]** of the correct instruction contains significant explanatory language relating to the reasonableness of the defendant's actions the given Instruction 14 does not.

Further and more importantly, the court's failure to instruct the jury that it could consider the imminent use of unlawful force by all aggressors acting with Fannie Powell caused prejudice and excused the State from its burden. A jury is presumed to follow the instructions given by the trial court. *State v. Jones*, 296 S.W.3d 506, 513 (Mo. App. E.D. 2009). The State had a duty to prove beyond a reasonable doubt that Emily did not act in

lawful defense of Randy Bolden. *Beck*, 167 S.W.3d at 788. Instruction 14 incorrectly limited the jury to consider only the actions of Fannie Powell. There was significant additional evidence of aggressive acts by others acting with her – including Tiffany Powell, who stabbed Randy in the eye, and an unknown man who knocked Randy unconscious – which the erroneous instruction did not allow the jury to consider. Tr. 749, 751, 753, 759, 820, 821.

The error "gave the State a pass on proving the negative of a contested element of the offense charged." *Beck*, at 789. The prejudice is particularly apparent in self-defense and defense of another cases, where a correct instruction is considered so vital that the court must instruct *sua sponte* if necessary. *Id.* (*citing State v. Goucher*, 111 S.W.3d 916, 919 (Mo. App. S.D. 2003)); *State v. Avery*, 120 S.W.3d 196, 200 (Mo. banc 2003).

Finally, the pronoun confusion in the instruction caused the jury to be misdirected further on the contested issue of the reasonableness of Emily's actions. The erroneous use of "he" erroneously told the jury to consider what Randy Bolden ("he") reasonably believed, rather than what Emily reasonably believed. Randy Bolden testified that he was knocked unconscious after he was stabbed in the eye. Tr. 759. Emily testified that she saw the three people attacking her brother and reacted. Tr. 820. Instructing the jury to consider what Randy reasonably believed, rather than what Emily reasonably believed, misdirected the jury under the facts of this case.

The jury's acquittal of Emily on *all* charged counts except Count III and Count IV (the associated count of armed criminal action) further demonstrates the errors in

Instruction 14 misled the jury and affected the verdict, causing a manifest injustice. The acquittals on Counts I, II, V, and VI indicate the jury did not believe the State's witnesses' account of this incident. Had the jury been correctly instructed, Emily would have been acquitted of all charges.

Once the defendant injected justification into the case, the trial court was required to instruct on defense of another, even if the instruction offered by the parties was not in proper form. *See Westfall*, 75 S.W.3d 278 at 281 n. 9. The error violated Emily's rights to due process of law and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. Because Instruction 14 was so significantly flawed, this Court should reverse this conviction and remand this cause for a new trial.

II - The trial court abused its discretion in refusing to hold an evidentiary hearing to determine whether the verdicts should be set aside, and in overruling the motion for new trial, because the court had credible information suggesting that juror Shawn Richardson was not qualified to serve and had engaged in misconduct, depriving Ms. Bolden of her right to a fair and impartial jury, a unanimous verdict, and to due process of law in violation of the Fifth, Sixth, and Fourteenth Amendments to United States Constitution, and the Missouri Constitution, Article I, Sections 10, 18(a) and 22(a), in that the court was on notice that this juror had stated to counsel after trial (1) that the verdicts he rendered were not his and that he falsely stated it was his verdict when the jury was polled, and (2) that he was not qualified to serve on the jury.

Preservation

"A defendant who claims misconduct affecting the jury or a juror is required to call such fact to the court's attention the first moment he becomes possessed of such knowledge and has an opportunity to do so." *State v. Robbins*, 455 S.W.2d 34, 27 (Mo. App. K.C. 1970); *Parker v. State*, 614 S.W.2d 776, 778 (Mo. App. S.D. 1981). When jurors fail to disclose information, courts may consider the issue of the juror's bias or misconduct before sentencing. *State v. Hermann*, 283 S.W.2d 617, 618-619 (Mo. 1965).

Here, counsel filed a motion on April 9, 2010, entitled "Amended Motion for Review or Set Aside Jury Verdict and to Compel the Testimony of Shawn Richardson." Supp. L.F. 1-2. Counsel argued this motion at sentencing. Tr. 935. Mr. Richardson had

contacted the judge after the verdict. Tr. 935. The judge had taken Mr. Richardson's phone number and provided it to both lawyers. Tr. 935. Mr. Richardson told defense counsel that he was disturbed by the verdict, that during deliberations he simply went along with the proceedings, that the verdicts were not his, that he should have voted not guilty, that he should have said "no" at the time the jury was polled. Tr. 935-936. In the motion, counsel stated, "Mr. Richardson said that the verdict that he rendered was not his[,] that he should have stood up and said that this was not his verdict at the time the jury was polled," and "that he did not feel he was qualified to be a juror, therefore did not participate in deliberations and agreed to what the other jurors said." Supp. L.F. 1. Mr. Richardson also spoke to the prosecutor. Tr. 938. According to the prosecutor, Mr. Richardson told her the opposite: that he did "work with the jury" and "review the instructions" and that the verdict was essentially his. Tr. 938. The court stated that even if it were to call Mr. Richardson to testify, if Mr. Richardson simply "wants to change his mind" that "would not be good enough." Tr. 939. The court overruled the motion to compel the testimony of Mr. Richardson and overruled the motion for new trial. Tr. 939-940.

Along with the separate motion regarding Mr. Richardson, the issue had been included in Ms. Bolden's timely-filed motion for new trial. L.F. 72; Rule 29.11(d). The issue is preserved for appellate review. *State v. Cooper*, 735 S.W.2d 85, 86 (Mo. App. E.D. 1987).

Standard of Review

An allegation of juror misconduct requires the court to hold an evidentiary hearing. *State v. Thompson*, 955 S.W.2d 828, 830 (Mo. App. W.D. 1997); *State v. Lynch*, 816 S.W.2d 692, 695 (Mo. App. S.D. 1991) (*citing United States v. McKinney*, 429 F.2d 1019 (5th Cir. 1970)). Failure to hold a hearing to determine the existence of juror bias upon credible information of such bias is reversible error. *Lynch*, 816 S.W.2d at 696-697*; State v. Martin*, 755 S.W.2d 33, 35 (Mo. App. E.D. 1988).

The decision whether to hold a hearing on juror misconduct is reviewable for an abuse of discretion. *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 90 (Mo. banc 2010). Judicial discretion is abused when a trial court's ruling is clearly against the logic of the circumstances then before the court, and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. White*, 81 S.W.3d 561, 567 (Mo. App. W.D. 2002). "Rulings made within the trial court's discretion are presumed correct, and as a consequence, the appellant has the burden of showing that the trial court abused its discretion." *Id.*

Discussion

In criminal cases, defendants have a federal and state constitutional right to a trial by a fair and impartial jury. U.S. Const. Amends. V, VI & XIV; Mo. Const., Art. I, §§ 10 & 18(a); *Turner v. Louisiana*, 379 U.S. 466, 471-473 (1965); *State v. Tyarks*, 433 S.W.2d 568, 569-570 (Mo. 1968). The Missouri Constitution also provides "[t]hat the right of trial by jury as heretofore enjoyed shall remain inviolate[.]" Mo. Const. Art. I, § 22(a). This right to trial by jury includes "all the substantial incidents and consequences

that pertain to the right to jury trial at common law." *State v. D.W.N.*, 290 S.W.3d 814, 828 (Mo. App. W.D. 2009) (*citing State v. Hadley*, 815 S.W.2d 422, 425 (Mo. banc 1991)). This includes the right to have the jury's unanimous concurrence in the verdict. *Id.*

Under Missouri statutes, a new trial may be granted when a juror "has been guilty of any misconduct tending to prevent a fair and due consideration of the case." Section 547.020(2). A new trial may also be warranted when "the verdict has been decided by means other than a fair expression of opinion on the part of all the jurors." Section 547.020(3). After a hearing, juror misconduct during a felony trial requires reversal for a new trial, unless the state affirmatively shows that the jurors were not subjected to improper influences as a result of any misconduct. *State v. Babb*, 680 S.W.2d 150, 151 (Mo. banc 1984); *Thompson*, 955 S.W.2d at 830.

A defendant is entitled to a full panel of qualified jurors. *State v. Wheat*, 775 S.W.2d 155, 158 (Mo. banc 1989). To qualify as a juror, the venireperson must be able to "enter upon that service with an open mind, free from bias and prejudice." *Id.* During *voir dire* examination, each prospective juror therefore has a duty to "fully, fairly and truthfully answer each question asked so that determinations may be made about each juror's qualifications and counsel may make informed challenges." *Nadolski v. Ahmed*, 142 S.W.3d 755, 764 (Mo. App. W.D. 2004) (internal citation omitted); MAI-CR 3d 300.02. "[I]n general, subject to limitations, it is recognized 'the remedy for allegations

of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.'" *Lynch*, 816 S.W.2d at 695 (*citing Smith v. Phillips*, 455 U.S. 209, 215 (1982)).

"The general rule in Missouri, referred to as the Mansfield Rule, is that a juror's testimony about jury misconduct allegedly affecting deliberations may not be used to impeach the jury's verdict." *Fleshner*, 304 S.W.3d at 87 (*citing Joy v. Morrison*, 254 S.W.3d 885, 889 (Mo. banc 2008)). "A juror who has reached his conclusions on the basis of evidence presented for his consideration may not have his mental processes and innermost thoughts put on a slide for examination under the judicial microscope." *Baumle v. Smith*, 420 S.W.2d 341, 348 (Mo. 1967). "In other words, juror testimony is improper if it merely alleges that jurors acted on improper motives, reasoning, beliefs, or mental operations, also known as 'matters inherent in the verdict.'" *Fleshner*, 304 S.W.3d at 87 (*citing Neighbors v. Wolfson*, 926 S.W.2d 35, 37 (Mo. App. E.D. 1996)). Matters inherent in the verdict include a juror not understanding the law as stated in the instructions, a juror not joining in the verdict, a juror voting a certain way due to misconception of the evidence, a juror misunderstanding the statements of a witness, and a juror being mistaken in his calculations. *Baumle,* 420 S.W.2d at 348.

Over the years, exceptions to the rule prohibiting juror testimony have been adopted. *Fleshner,* 304 S.W.3d at 88. Jurors may testify about juror misconduct occurring outside the courtroom. *Id.* (*citing Travis v. Stone*, 66 S.W.3d 1, 4 (Mo. banc 2002)). Jurors may testify as to whether they gathered evidence independent to that presented at trial. *Id. (citing Middleton v. Kansas City Pub. Serv. Co.*, 348 Mo. 107, 152

S.W.2d 154, 156 (1941) (where juror visited several used car dealerships measuring the type car involved in the accident)); *see also State v. Stephens*, 88 S.W.3d 876, 882 (Mo. App. W.D. 2002) (allowing juror testimony about outside research by juror); *State v. Lynch*, 816 S.W.2d 692, 695 (Mo. App. S.D. 1991) (others overheard juror making biased comments during a court recess). Jurors may also be heard to testify about statements made in the jury room during deliberations that show ethnic or religious bias. *Fleshner*, 304 S.W.3d at 88.

Juror Shawn Richardson played football with the Canadian Football League, and was also a student. Tr. 168, 636. After the verdict, the jury was polled, and Mr. Richardson apparently stated he concurred with the verdict. Tr. 934. Also, the prosecutor had asked the entire panel at the end of her *voir dire* if there was any issue not covered in *voir dire* that the potential jurors believed that she should know about. Tr. 182. According to defense counsel, Mr. Richardson informed him after trial that the verdict was not his, that he falsely stated it was his verdict when the jury was polled, and that he was not qualified to serve on the jury. Tr. 935-938. The court had an obligation to hold a hearing on the issue of Mr. Richardson's possible misconduct, partiality, or other disqualification.

In *State v. Harding*, 734 S.W.2d 871, 875 (Mo. App. E.D. 1987), a juror informed the court that the verdict was not her verdict. This Court noted, "It is well settled law in this state that a juror will not be heard to impeach his own verdict or the verdict of a jury of which he was a member." *Id.* (*citing State v. Gabriel*, 342 Mo. 519, 116 S.W.2d 75, 79

(1938)). "[J]urors speak through their verdict, and cannot be allowed to violate secrets of the jury room and tell of any partiality or misconduct that transpired there, nor speak of methods which induced or operated to produce the verdict, and this has become the settled law of this state." *Id.* (*citing State v. Keller*, 104 S.W.2d 247, 249 (Mo. 1937)). This Court affirmed the trial court's decision not to hear the testimony of the juror. *Harding*, 734 S.W.2d at 875.

Since *Harding*, however, courts have recognized exceptions to the general rule against juror testimony impeaching a verdict. Jurors may, of course, be examined about a failure to give truthful answers during *voir dire* examination. *Johnson v. McCullough*, 306 S.W.3d 551, 555 (Mo. banc 2010). Jurors may also be heard to testify about statements made in the jury room that show bias. *Fleshner*, 304 S.W.3d at 88.

When Mr. Richardson admitted falsely stating that he concurred in the verdict when the jury was polled, that was a false statement or misconduct. A new trial is warranted when a juror "has been guilty of any misconduct tending to prevent a fair and due consideration of the case." Section 547.020(2). A new trial may also be warranted when "the verdict has been decided by means other than a fair expression of opinion on the part of all the jurors." Section 547.020(3). After *Fleshner* – which concerned statements made inside the jury room – *Harding* and similar cases have been called into question to the extent they declare a blanket exclusion of all juror testimony tending to impeach the verdict or that violates secrets of the jury room. If Section 547.020 is to have meaning or effect, there must be a way to prove "any misconduct tending to prevent

a fair and due consideration of the case" or whether "the verdict has been decided by means other than a fair expression of opinion on the part of the jurors." Section 547.020. After *Fleshner*, testimony from Mr. Richardson should be taken at a hearing for the purpose of establishing that the verdict he rendered was not his and that he falsely stated it was his verdict when the jury was polled.

Further, Mr. Richardson also told trial counsel that he was not qualified to be a juror. Supp. L.F. 1. The precise reason why Mr. Richardson believed he was unqualified to be a juror is not clear. Section 494.425 (persons ineligible for jury service); Section 494.470 (grounds for challenges for cause). "To qualify as a juror, the venireman must be able to enter upon that service with an open mind, free from bias and prejudice." *White v. State*, 290 S.W.3d 162, 165-166 (Mo. App. E.D. 2009). "Where a venireperson's answer suggests a possibility of bias, that person is not qualified to serve as a juror unless, upon further questioning, he or she is rehabilitated by giving unequivocal assurances of impartiality." *Id.* "Both parties are entitled to unbiased jurors whose experiences, even innocently and reasonably undisclosed, will not prejudice the resolution of the cause." *Overlap, Inc. v. A.G. Edwards & Sons, Inc.*, 318 S.W.3d 219, 224 (Mo. App. W.D. 2010).

If, as his statements to counsel suggest, Mr. Richardson failed to disclose something relevant to his qualification to serve during *voir dire*, Emily would be entitled to a new trial. *White*, 290 S.W.3d at 166. The State asked the panel if there was anyone who was thinking, "You know what, I really wish she would have asked this" question,

by which she meant, "something you feel like [she] should know but . . . didn't ask." Tr. 182. On remand, the trial court would be in a position to determine whether any questioning by the parties on the issue of Mr. Richardson's qualifications was clear, and whether any nondisclosure was intentional or unintentional. *Wilford ex rel. Williams v. Barnes Hosp.*, 736 S.W.2d 33, 36 (Mo. banc 1987). If the disclosure is intentional, prejudice will be presumed, requiring a new trial. *Id.* On this Point, Emily asks for this Court to remand this case for an evidentiary hearing.

CONCLUSION

On Point I, Appellant asks this Court to remand for a new trial.

Alternatively, on Point II, Appellant asks this Court to remand for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that on this **21st day of February, 2012**, a true and correct copy of the foregoing brief served via the efiling system to the Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65101. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed the greater of 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains **8,254** words. Finally, I hereby certify that the electronic copies of this brief have been scanned for viruses and found virus-free.

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